

WORKING PAPER

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**Northwest
Territories** Legislative Assembly

DISCUSSION PAPER ON THE
DENENDEH GOVERNMENT PROPOSAL

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I. INTRODUCTION

The Legislative Assembly's Special Committee on Constitutional Development distributed a pamphlet to the public this summer comparing the Government of the Northwest Territories and the Denendeh Government Proposal. The pamphlet also briefly outlined ten major issues related to the Denendeh proposal that will be discussed in more detail at this conference.

This discussion paper was developed to give more information on those ten issues and to assist in orderly discussion of these issues. The committee hopes this conference can reach a common understanding of these issues and make specific recommendations for us to present to the Legislative Assembly.

First, we should make clear the role of the Legislative Assembly's Special Committee on Constitutional Development and where it fits in the over-all process of constitutional change in the Northwest Territories. The following is a verbal description of the over-all process. On page 4 there is a visual explanation.

The Legislative Assembly believes that the Aboriginal associations in the Northwest Territories must participate fully in the process of political and constitutional change in their homelands. Thus, the Legislative Assembly is actively participating on a Constitutional Alliance with the major Aboriginal associations, namely: the Inuit Tapirisat of Canada; Committee for Original Peoples' Entitlement; the Metis Association of the Northwest Territories; and, the Dene Nation. The Alliance membership includes two repre-

sentatives from each of those Aboriginal associations and four MLA's, including two non-native MLA's, representing the Legislative Assembly.

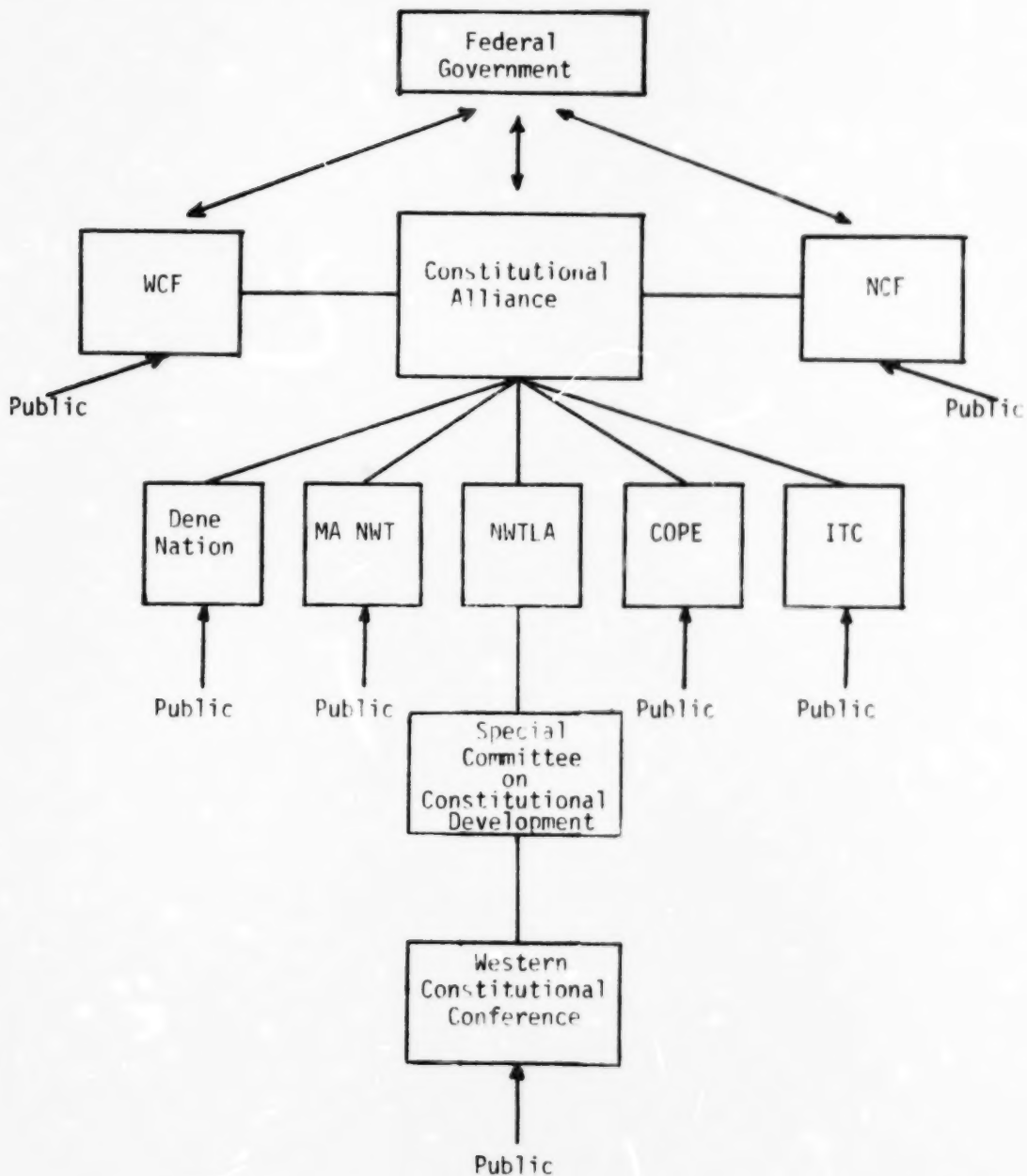
In response to the plebiscite vote in favour of dividing the Northwest Territories into two separate territories, the Alliance created a Nunavut Constitutional Forum and a Western Constitutional Forum which are responsible for developing and implementing the constitutional framework for each new territory. The two Forums will meet together as an Alliance from time to time to coordinate efforts and develop common positions on certain issues, such as the boundary between East and West.

The members of each Forum will consult with their memberships and the public and bring positions to the Forum or Alliance meetings where a common position will be agreed on. Each Forum also may hold public hearings. All major common positions must be agreed on by the Legislative Assembly and the Directors or Assemblies of the Aboriginal groups before being presented to the Federal Government.

The Special Committee on Constitutional Development is the Legislative Assembly's way of consulting with the people of the Western Northwest Territories. After public consultation, the committee will make recommendations to the Legislative Assembly. The Assembly will debate the committee's recommendation and develop positions for its four representatives to take to the Constitutional Forums or Alliance meetings.

These various mechanisms put into practice the Constitutional Alliance's adopted position that constitutional and political change must come from within the Northwest Territories through an active public process.

Northwest Territories Constitutional Development
Organizational Chart



NOTES: * The Legislative Assembly representation on the Constitutional Alliance is 4 MLA's including 2 non-native members.

* COPE's 2 representatives on the Constitutional Alliance can sit on either or both Forums until the boundary is agreed on.

II. PRINCIPLES

Before dealing with any subject as complex as political and constitutional change, there is a need for some broad principles as a basis for the discussion. Six principles are suggested in the Government of the Northwest Territories discussion paper "Our Land, Our Future" as being fundamental to political and constitutional development in the North today:

1. Government decision making should rest as closely as possible with those governed.
2. Every level of government in the Northwest Territories must have sufficient power, authority, and resources available vested in it to enable it to carry out its responsibilities.
3. Government should be representative of and accountable to the people of the Northwest Territories.
4. Residents of the Northwest Territories should enjoy political rights and privileges equal to those enjoyed by other Canadians.
5. Residents of the Northwest Territories should assume the major responsibility for determining the constitutional framework of the Northwest Territories and the direction of political change within that broad framework.
6. Rights and freedoms granted in aboriginal claims settlements must be protected in law.

Agreement on these fundamental principles can be a meaningful first step in developing democratic public government for the Western Northwest Territories.

III. COMPARISON - DENENDEH GOVERNMENT/GOVERNMENT OF N.W.T.

To compare the Denendeh Government proposal and the current Government of the Northwest Territories, please refer to the center pages of the pamphlet prepared by the Aboriginal Rights and Constitutional Development Secretariat on behalf of the Special Committee on Constitutional Development.

IV. DISCUSSION OF IDENTIFIED MAJOR ISSUES

The principle task of the Special Committee is to stimulate discussion and solicit public input. This input is necessary to develop a government designed by all Northerners that reflects our unique Northern community and, at the same time, has specific features to protect and enhance the rights of native people. This section will guide our discussions through those features set out in the Denendeh government proposal. In developing recommendations we will be restricted in many cases by existing constitutional practices and restraints. Some parts of the Denendeh proposal challenge these practices and restraints and we must, therefore, be aware of these from both a legal and a political point of view.

1. DENENDEH SENATE

- A) PURPOSE/PRINCIPLE: In order to protect and enhance the aboriginal rights of the Dene and Metis for the future, special powers and institutions serving this purpose must be a part of the new political system.
- B) DESCRIPTION: The Denendeh Senate would be made up exclusively of Dene and Metis, elected only by them. It would have power to refuse to pass legislation that it determined would adversely affect aboriginal rights as defined in the final claims settlement. The Senate will list its objections and return the legislation. The revised legislation will be sent back to the Senate. The Denendeh Senate also would have power to set up and run institutions created to manage Exclusive Dene Lands and resources.
- C) DISCUSSION: The idea of having a Senate in Denendeh is not a new one, in Canada or elsewhere. Under Section 71 of the Constitution Act, 1867, the legislature in Quebec was to be composed of two houses; this was only changed recently. Similarly, in 1876 the constitution of Manitoba called for a bicameral legislature. All Provinces have now abolished the Upper House, but the idea has been maintained and supported by keeping the Senate in our federal Parliament. In the United States, both federal and state legislatures have an elected Senate (except Nebraska).

The Senate's role in counterbalancing the otherwise complete power of the Commons is a well-accepted principle of democratic federalism. Thus, the idea of a Senate in the constitutional makeup of the North is neither radical nor archaic. The Denendeh proposal suggests the Senate would play a vital role in the government of Denendeh, especially in protecting aboriginal rights. While the intention is not controversial, the specifics pose two critical and inter-related problems: the selection process of the members of the Senate; and, the extent of the powers of the proposed Senate.

The Denendeh proposal says only Dene may qualify for Senate membership. The details of the selection process are not defined. Theoretically, there must be a limit on the number of Senators, particularly if they are to receive remuneration out of public funds. The method of choosing a Senate is not really an issue - Senators are elected in the United States but appointed in Canada - but it should be clarified and entrenched in the Constitution to avoid arbitrariness and political consideration.

Limiting the Senate to exclusively Dene membership would not create an institution that is normally regarded as a Senate, and may be contrary to the anti-discrimination clause [Section 15(1)] in the Charter of Rights and Freedoms because eligibility would be based on ethnic origin. If the Senate was to be open to all citizens of Denendeh and its membership not based on

race, then a bicameral house could be established. But the intent in the Denendeh proposal is to safeguard aboriginal rights, not to set up a Senate in the traditional parliamentary sense. It would be more appropriate to avoid using the term "Senate" to describe the proposed body whose role is basically that of a watchdog agency. The proposed Dene Senate is not in any traditional way concerned with the normal duties and responsibilities of an Upper House and the use of the term Senate is confusing.

But if the Dene Senate is thought of as a review Board with powers to restrict any proposed legislation affecting aboriginal rights, the idea takes on more substantial implications. There are many precedents for such analysis of proposed laws. Most provincial governments and the federal government have proposed legislation reviewed by committees (or the Senate) to ensure it does not violate other guaranteed constitutional or statutory rights, for example international human rights conventions which we have signed, the Bill of Rights and the Charter of Rights and Freedoms. Screening legislation to make sure it reflects certain standards or beliefs is not new and could be done by a Dene "Senate".

To sum up - there is a general principle that can readily be supported without offending constitutional tradition: A Dene institution can be created and entrenched in the Constitution of the Territory (or Province) whose role is to

preserve and protect aboriginal rights.

The second problem is perhaps more difficult to reconcile with current Canadian practices - the powers of the Senate. As the only elected body which represents the total population, the national assembly is the body ultimately responsible to the voters. The supremacy of Parliament is a time-honoured principle of Canadian democracy and will be hard to displace.

The role of the proposed Senate conflicts also with the normal role of the Courts as the final arbiter of disputes involving the interpretation of statutes and interpreter of the Constitution. The Courts have proven reluctant to surrender the power of protecting the rights and civil liberties of the citizens of Canada. Statutory restrictions on the right of appeal to the Courts have consistently been circumvented by the courts. It would be a substantial deviation from normal practices if the Senate, rather than the Court, was made the final voice in matters involving aboriginal rights.

Thus, it may be more appropriate to entrench an aboriginal institution in the constitution of the territory to preserve and protect aboriginal rights. The powers of that institution could be similar to a review-agency or administrative board with right of appeal to the Courts.

Another alternative to achieving the goal sought by the Dene is to have aboriginal rights clearly defined in the constitu-

tion and have the "Senate" charged with protecting these rights by overseeing legislation. But if a dispute arises as to whether a statute actually infringes upon these rights, the matter would be sent to the Courts for a decision. The Court has the necessary impartiality and legal knowledge to make such decisions. Experience has shown that statutes give rise to many subtle and varied interpretations and these cannot be effectively understood unless interpreted by an independent judicial body.

2. RESIDENCY REQUIREMENTS

- A) PURPOSE/PRINCIPLE: Political decisions affecting Northerners must be made by those who have to live with the consequences - the long-term residents.
- B) DESCRIPTION: It is proposed that in order to be eligible to vote or hold office in Denendeh, a person must have lived in the Territory for ten years as well as in the community for two years.
- C) DISCUSSION: The 10-year residency proposal has been studied in detail and it seems a three-year residency requirement now is being looked at. The North's unique characteristics may mean that a three-year requirement would possibly be upheld by the Courts.

The Charter of Rights and Freedoms in the Constitution Act, 1982, guarantees basic democratic freedoms for Canadians.

Section 3 says:

"Every citizen of Canada has the right to vote in an election of members of the House of Commons or for a legislative assembly and to be qualified for membership therein."

It is not clear whether a three-year or longer residency clause would infringe this section of the Charter. But it is possible such a requirement would be found acceptable under the general wording of Section 1 of the Charter, which states:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

It can be argued that a three-year residency requirement in the North is justified because of the North's unique characteristics, such as the large numbers of Southern workers who would be brought in to work on energy mega-projects.

Currently, the maximum residency requirement in Canada is one year in Quebec, the Northwest Territories, Yukon, British Columbia, Ontario, Prince Edward Island and Newfoundland, and six months in the other provinces.

It should be noted that the Canadian Constitution gives the provinces and territories power to set residency requirements. The only restrictions on that power are those set out in the Charter.

If the matter comes to the courts, the courts may look at the possibility that long residency requirements would be made law across Canada, thus removing the vote of many Canadians. The courts, however, could look at the North's unique situation as valid reason for a longer residency requirement here, recognizing that what is reasonable in the South may not be reasonable in the North.

American courts have rejected attempts to impose long residency requirements. However, Canadian courts may not follow the American example because Canada's political, historical and judicial pattern of development is very different from that of the United States.

To sum up -- A residency clause longer than one year may be rejected by the Courts. But the fact that the situation in the Northwest Territories is unlike that in the South may justify a longer requirement.

3. CHARTER OF FOUNDING PRINCIPLES

- A) PURPOSE/PRINCIPLE: A Denendeh government must embody the values of the Dene and reflect their style and form of political organization.
- B) DESCRIPTION: A Charter of Founding Principles for Denendeh would entrench the rights of Dene, Metis and other Canadians to establish government funded institutions and services to reflect their respective values and ways; entrench native and english languages; entrench the harmonious relationship of the Dene with the physical environment as the basis for environmental laws; entrench a decision-making process whereby development projects ensure the total well-being of the people and resources of Denendeh; and entrench other individual or collective civil and political rights. Voters and office holders must pledge to uphold this Charter. (See Appendix A for Charter.)
- C) DISCUSSION: A pledge or oath of loyalty is made to the state, that is, to the Queen as legal head of Canada. There is no precedent in Canada for swearing allegiance to a list of principles.

The emotional connotations of the word "pledge" may obscure the intent of the proposal.

The founding principles can be entrenched in the constitution of a new government and thus become law. As such, all citizens

must uphold these principles without choice or a pledge. Any violation would be subject to scrutiny by the courts and the penalties thereto. Both public agencies and private acts would be bound by the entrenched principles. Translating principles into legal rights or guarantees could achieve the goals of the Dene without requiring a pledge.

4. NATIONAL AND COMMUNITY COUNCIL AND ASSEMBLY SYSTEM

- A) PURPOSE/PRINCIPLE: To follow Dene tradition and to increase the rights of all residents of Denendeh, government by the people rather than government by representatives should be encouraged.
- B) DESCRIPTION: The National or Denendeh Assembly and the community assembly will have clear legislative authority to set policy and make decisions on major issues within their jurisdictions. The government of Denendeh and the community councils would carry out policies and instructions of their assemblies and make laws within their jurisdictions. All laws must conform to the Charter of Founding Principles.
- C) DISCUSSION: There appears to be a general consensus on the benefits of more direct community participation in the political process. The Dene proposal is flexible on how the elected Council would be chosen and their alternatives reflect basic democratic principles.

Implementing such a system in large communities may be difficult. Frequent attendance by the whole community may be hard to achieve and the result may be that only a few residents control decision-making. Also, if referendums are used frequently, it may be difficult for decisions to be made promptly as situations develop and change.

Under the Canadian Constitution, specific areas of power or authority are granted to the provinces and others to the federal government. They are, for the most part, mutually exclusive. Generally, in section 91, the federal parliament is given power over matters of national importance, such as shipping, currency and trade and commerce. The provincial legislatures, under section 92, are given the power to make laws in relation to matters of a local or private nature, such as property and civil rights, licensing and direct taxation. In particular, the provincial legislatures, in s. 92(8) are given power to make laws in relation to "Municipal Institutions in the Provinces". As a result, local and municipal governments are a provincial matter. The same power is given to the Northwest Territories in section 13(c) of the Northwest Territories Act which gives the Northwest Territories legislative power to make laws in relation to:

"... municipal institutions in the Territories, including local administrative districts, school districts, local improvement districts and irrigation districts ..."

Thus, as the situation now exists in the Northwest Territories, the community council derives its power from the territorial government. If the Northwest Territories was a province, community councils would get their powers from the provincial legislature. The community council, being a delegate of the territorial or provincial legislature, cannot have more or

greater powers than those given to the province or territory by the constitution.

The Dene proposal is unique to Canadian constitutional traditions in that it proposes to give community councils exclusive power in some areas not derived from the territorial/provincial legislature. Such an idea is new and would require a change in the Northwest Territories Act or a different type of provincial constitution upon achieving that status.

As the situation now stands, powers given the community council cannot be greater than those of the province or territory of Denendeh. Any community laws which conflict with either territorial or federal laws would be declared invalid by the courts. The councils can only be delegated powers by the territorial government and these powers must not infringe upon areas granted exclusively to the federal government.

The concept of exclusive community government jurisdiction is new to Canada, but, the division of community/provincial powers outlined in the Denendeh proposal could be incorporated into a Federal act establishing a Denendeh government. However, if provincial status is also to be obtained, the provincial governments now have a voice in the creation of a new province and its constitution.

5. GUARANTEED REPRESENTATION

A) PURPOSE/PRINCIPLE: The political system proposed is based on the fact that the Dene are the original inhabitants and their descendants are still the majority of permanent residents in the area, and are thus entitled to a form of public government reflecting that majority. There is recognition, however, that at some time in the future the descendants of the Dene may be a minority in their homeland. It is assumed, although not all that clear, that guaranteed representation is sought to provide them with a continuing voice in the government of their homeland in perpetuity.

B) DESCRIPTION: In communities where the Dene, now or in the future, are a minority of the eligible voters, the community council will be selected in the following way:

- i) a certain number of councillors will be elected by a ward system election with one ward for each 300 residents to a maximum of 15 wards. All eligible to vote in the ward election;
- ii) the Dene will be guaranteed 30% of the total number of council seats. Only the Dene will vote for these members of council.

The National Assembly will be the major political body at the territorial level of government. The Dene will at all times hold 30% of the seats in the National Assembly. If

their number of seats should fall below 30% the eligible Dene voters will, in a manner determined by the Senate of Denendeh, elect sufficient Dene members to bring their number of seats to the guaranteed level of 30%.

- c) DISCUSSION: The guaranteed representation sought by the Dene is not against Canadian tradition. Quebec has constitutional guarantees reflecting its predominantly French population. In other Commonwealth countries, for example, New Zealand and India, minority groups have a guaranteed number of seats in the legislature. Appendix B gives a brief outline of similar arrangements in other countries. In each case it seems that the purpose is to guarantee minority or tribal groups a voice in the government of their country or homeland.

The Denendeh proposal for guaranteed representation in Denendeh poses some potential problems. There is no difficulty in principle with the idea of guaranteeing the Dene a voice in government. But using guaranteed representation to retain substantial control over government in Denendeh could run into difficulties with the principles of representative government. This intention of the proposal is not clear.

As well, it may be difficult to reconcile the two concepts of public government and representative government. In the Denendeh proposal, the people would have ultimate authority

either by referendum or direct participation, and elected representatives would just carry out the peoples' decisions. Non-native communities may prefer reliance on elected members to represent their views. It is difficult to say if these two kinds of government can be brought together within one system and be effective.

Several other factors should be considered in implementing the principle of guaranteed representation. The principle should provide guarantees for both native and non-native populations if appropriate. The principles of "one man, one vote" and of elected members' accountability to the electorate at large, not to just one particular group of people, must be observed. The ratio of seats guaranteed for any one group to those available in the Assembly as a whole must be examined carefully to ensure that representation reflects the makeup of the population as a whole. The injection of a party system would certainly make this a real issue. However, if the principle of guaranteed representation described in the Denendeh proposal is interpreted as being a means to ensure a voice in the National Assembly and not to ensure substantial control of the legislative power regardless of population, then these factors will be less important.

6. DENE HERITAGE FUND

- A) PURPOSE/PRINCIPLE: Will ensure legislative protection for a long-term source of revenue to meet Dene needs and aspirations.
- B) DESCRIPTION: The Dene will attempt to secure 10% of all government resource revenues as part of their aboriginal settlement. The constitution will authorize the Denendeh government to collect this money for the Dene and deposit it into a Dene Heritage Fund.
- C) DISCUSSION: The Denendeh proposal does not make it clear whether the Dene Heritage Fund is to be made up of money collected by the Dene through an aboriginal rights settlement or of money collected out of government revenues in addition to the claims settlement. The first possibility presents no problems, but the second possibility may violate the Charter of Rights and Freedoms. As well, it is not clear whether the word government used in the plural means contributions from community, federal and provincial/territorial governments, or just one level of government.

If this fund involves money additional to the claims settlement, it may run afoul of the Charter of Rights and Freedoms. This Act, which is now part of the Canadian constitution, forbids any government from discriminating, either by law or practice, on the basis of a number of criteria, including

race and ethnic origin. To set up such a fund on a perpetual basis would probably violate the Charter.

To have an act that provides a certain per cent of public money in perpetuity to any group may violate Section 15 of the Charter of Rights which states:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This heritage fund contemplated, unlike the Alberta Heritage Fund, is for a racial group as opposed to the benefit of all residents of a province.

There is no rationale advanced for this proposed fund. If the claims settlement is equitable, it should provide sufficient funds for the economic growth and security of the Dene. The legislative body responsible for dispersing taxpayers' money can certainly allocate funds to various groups or to affirmative action programs. However, this must be subjected to the normal legislative budget debate and decision-making process on individual requests and needs.

In summary, it is not clear how the Dene Heritage Fund would operate. If it is a source of revenue in addition to the

claims settlement, the constitution may prevent its implementation.

7. RESOURCE DEVELOPMENT DECISIONS

- A) PURPOSE/PRINCIPLE: Decisions concerning the development of non-renewable resources in Denendeh will be based on a "conservator society" need and will take into consideration needs of the environment, the Dene, the people of Denendeh and their government.
- B) DESCRIPTION: The Charter of Founding Principles will entrench the harmonious relationship of the Dene with the physical environment as the basis for environmental laws, and will entrench a decision-making process whereby development projects ensure the total well-being of the people and resources of Denendeh (as opposed to the economic benefit of the developers).
- C) DISCUSSION: The idea of a "conservator" society is generally viewed as being necessary to the future welfare of the North and Canadian society in general. As always, trying to balance conservation and development poses a dilemma. Those people who must decide to conserve a resource also may be the people who would benefit most from development of that resource and could end up in the untenable position of both judge and beneficiary. It is a difficult role to support high principles when one's economic benefits may increase with the ignoring of such principles.

This is not to suggest that wrong motivations will prevail but rather that economic factors and individual needs will place constraints on the decision process.

8. LAND OWNERSHIP

- A) PURPOSE/PRINCIPLE: To ensure that public and Dene ownership of land is maintained.
- B) DESCRIPTION: Present titles to property ownership will be honoured, but in the future, property titles will only be granted by the government and native collective as long-term leases with occupancy rights. Within community boundaries, leasehold terms and conditions will be set by the community government. Beyond community boundaries, land leases will be negotiated with the owner, either the government of Denendeh or a native collective.
- C) DISCUSSION: It is necessary to consider the relationship between the Dene and the land and how important this relationship is in Dene culture to appreciate this principle. To the Dene -- traditionally a hunting, fishing and food gathering people -- the land and its natural resources are for the benefit of all, to be used and respected and passed on to future generations. The concept of owning land is foreign and there is no need for private property. From this point of view, land is not a commodity to be bought and sold.

But private ownership of land is a privilege considered by many non-native people as being akin to an "inalienable right". To own property is one of the most common aspirations of Canadians and is generally pursued as the first and wisest major investment for families.

In reality, however, the British tradition has been typified by long-term leasing as a viable means of ownership. The 99 or 999 year leases were frequently used to transfer property but keep the reversion right in the family. In Canada, as elsewhere, the lease is the most common method for carrying on commercial activities. Thus, leasing rather than private ownership evokes a strong emotional response from non-native people despite the historical and current widespread use of the lease.

All land is vested in the right of the Crown (federally or provincially) and granting such land in fee simple ownership does not change this fact. Fee simple involves two basic rights: 1) the right to dispose of your property (by sale, lease, gift or will); and, 2) the right to be compensated for the value of your property should the Crown or its agencies require your lands. The Crown, using equitable methods, can always reclaim the lands even though they are granted in fee simple. In practice, long-term leasing does not vary from fee simple in this aspect.

A number of issues may complicate the process of leasing. These may include the following:

- the drawing-up of leases require greater legal effort and expense;
- if a lease is not for a long period of time, uncertainty about future financial commitments may cause insecurity

and make planning difficult; and,

- if the funds collected from leasing are to provide income for the community, how are rates to be established to anticipate future market conditions, inflation, etc.?

9. DENE RIGHT TO AMEND CONSTITUTION

- A) PURPOSE/PRINCIPLE: The Dene descendants will preserve the right to negotiate any changes in Denendeh governing institutions.
- B) DESCRIPTION: A Denendeh constitutional amendment clause must preserve the right of Dene and Metis to participate as a collective in changing any governing institutions.
- C) DISCUSSION: The right of the Dene to participate in any changes that might affect the government or institutions of Denendeh is taken for granted. Many of the political and institutional mechanisms recommended in their proposal will facilitate this process. e.g. Senate; guaranteed representation; etc.

A specific clause requiring consultation would ensure Dene involvement, but the elected representatives or communities should still have ultimate control for major decisions.

10. STYLE AND FORM OF GOVERNMENT

- A) PURPOSE/PRINCIPLE: The political system proposed is based on the fact that the Dene and Metis are the original inhabitants and still the majority of permanent residents in this area, and are thus entitled to a form of public government reflecting that majority. Such a government must therefore embody the values of the Dene and reflect their style and form of political organization.
- B) DESCRIPTION: As discussed under issue 3, the proposed Charter of Founding Principles would entrench the special Dene relationship to the environment as well as a decision-making process to control resource developments. In the tradition of the Dene, government by the people will be encouraged rather than government by representatives. This is reflected in powers proposed for the community and National assemblies as well as in the requirement to hold referenda on certain major decisions. Dene languages will become official languages along with English and French. Ceremonial trappings of government must reflect Dene customs and traditions.
- C) DISCUSSION: The methods of governing should recognize and enhance the cultural traditions of the people governed. Symbolic gestures are often more important to the public as they are the most visible expression of the style of government. The cultural diversity of the North should be reflected

in the ceremonial trappings of the legislature. To decrease the discomfort often felt by the Dene in current legislative formalities, changes should be enacted to encourage Dene dress, customs and beliefs. Such a proposal does not involve any sacrifice from the non-Dene. The legislative assembly can serve as an example to the public of the co-existence of diverse cultures in mutual respect.

Two other elements may be implicit in this proposal: 1) the stress on government by consensus; and, 2) greater accountability of the elected representatives toward the electorate (public government).

It is not clear yet whether consensus-type government can work effectively in an increasingly large, complex and multi-cultural society. The principle of consensus is laudable but the practice may prove to be unworkable especially as the North grows in population and sophisticated expertise.

The goal of consensus - to achieve agreement through the recognition of the common good - is not that different from majority rule. Both systems use persuasion and try to gain support from the participants. In the consensus situation, those opposed may not vote if they perceive themselves to be in a minority and thus consensus is achieved in appearance but not reality. In other words, it is possible that negative votes would not be recorded in a consensus situation but would be recorded in a majority situation. The practices may have

more in common than would appear at first glance.

Greater accountability is the goal of any democracy and this principle is shared by all cultural groups in Canada. Once again, problems may arise in implementing this goal rather than from the goal itself. It may be inefficient to have the flow of authority come directly from the populace on a frequently recurring basis. Effective government often requires quick decision and highly specialized expertise. These traits preclude the consultation with the public at large.

11. DIVISION OF POWERS

- A) PURPOSE/PRINCIPLE: The unique character of life of the Dene requires that certain powers now possessed by the federal government be transferred to Denendeh.
- B) DESCRIPTION: In addition to the usual powers given to a provincial government, the Denendeh Assembly seeks to have control over navigation and fisheries, family relations, communications, labour and employment, and diplomatic relations with all other aboriginal nations.
- C) DISCUSSION: As discussed earlier in this paper, there is a division of powers under our constitution between the federal and provincial legislatures. The Denendeh proposal seeks to move away from the traditional division of powers in having authority over some areas that fall into federal jurisdiction under S. 91 of the Constitution Acts, 1867 to 1982. These areas are not granted under the N.W.T. Act and would not be granted to a Denendeh province unless an amendment was made to the Canadian Constitution. In other words, under the distribution of powers currently set out in our constitution, the Denendeh proposal seeks control over some areas of law that are exclusively in the federal jurisdiction.

The federal Parliament was given absolute jurisdiction over the territories by the Constitution Act, 1871. Section 4 of that Act states:

The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province.

As such, the federal Parliament has jurisdiction over areas that would normally be possessed by a provincial legislature. However, the federal Parliament has passed the Northwest Territories Act which delegates to the Northwest Territories legislature most of the powers possessed by the provinces. The Federal government has the power to give the government of Denendeh the additional powers it seeks.

If provincial status is granted, then one must deal with the traditional division of powers as set out in S. 91 and 92 of our constitution. Section 146 of the Constitution Act, 1867 is particularly relevant. It states:

It shall be lawful for the Queen ... on the Address from the House of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union ... subject to the Provisions of this Act.

The latter clause indicates that any new province of Denendeh would be bound by the division of powers set out in the constitution unless the constitution was amended.

Such an amendment would require the support of the provinces, but this probably would not be difficult. The idea put forward in the Denendeh proposal are not as radical as they might at first appear. The provincial governments have consistently argued for the transfer of many of the same powers to themselves from the federal government. It is quite likely that their support may be obtained in this endeavour.

In summary, at present there are constitutional constraints on the extent of the powers sought for the Government of Denendeh. To eliminate these barriers, the federal government can change the N.W.T. Act while the Northwest Territories remains a Territory or, the Constitution of Canada can be amended so that the Northwest Territories obtains these powers upon becoming a Province.

V. CONCLUSION

Recommendations from this conference and other similar meetings or hearings will be reviewed and consolidated by the Special Committee on Constitutional Development, and then presented to the Legislative Assembly for debate. Positions developed by the Assembly on the basis of these recommendations will, where appropriate, be conveyed to the Western Constitutional Forum where a common Western Northwest Territorial position will be developed. This may sound like a complicated procedure but all community interests in the West must participate in the process if we hope to develop a government that we can all feel comfortable with. It will be a long and sometimes difficult process that will require patience, understanding and good will on everyone's part. Thank you for participating in this conference.

APPENDICES

APPENDIX A

CHARTER OF FOUNDING PRINCIPLES

The Government of Denendeh will exercise its powers according to founding principles that are consistent with the Canadian Constitution and are set out in a *Charter of Founding Principles for Denendeh*. The Charter of Founding Principles will:

- (1) entrench the rights of the Dene and other Canadians to establish government funded institutions and services to reflect their respective values and ways in areas such as:
 - . education (from pre-school through university);
 - . health services;
 - . social services;
 - . arts;
 - . media;
 - . recreation and games;
 - . training in traditional skills and crafts;
- (2) entrench native languages, along with English as official languages in Denendeh;
- (3) entrench the harmonious relationship of the Dene with the physical environment as the basis for environmental laws;
- (4) entrench a decision-making process whereby development projects ensure the total well-being of the people and resources of Denendeh (as opposed to the economic benefit of the developers);

In addition, the Charter will contain rights and freedoms similar to those included in the International Covenant on Civil and Political Rights (which is signed by Canada). Sections 18, 19, 21, 22 read:

ARTICLE 18

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents, and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ARTICLE 19

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only

be such as are provided by law and are necessary:

- (a) for respect of the rights and reputations of others;
- (b) for the protection of national security or of public order (ordre public), or of public health or of morals.

ARTICLE 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE 22

- (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions may be placed on the exercise of this right than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
- (3) Nothing in this article shall authorize State Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice the guarantees provided for in that convention.

APPENDIX B

Examples of Countries where various forms of Guaranteed Representation is provided.

1. New Zealand

- Parliamentary system of government closely patterned on that of the United Kingdom.
- No written constitution.
- Executive authority is vested in the 24-member cabinet led by the Prime Minister, the leader of the political party or coalition of parties that holds the majority of seats in Parliament.
- The unicameral Parliament (House of Representatives) has 92 members, 4 of whom must be Maoris elected on a separate roll. (However, Maoris may also run and are elected as regular candidates to Parliament.)
- Representatives are normally elected for a three-year term, although elections can be called sooner if necessary.

2. Denmark

- A limited or constitutional monarchy.
- According to the Constitution of 1953, the unicameral Folketing consists of not more than 179 members, two of whom must be elected from the Faeroe Islands and two from Greenland.
- Elections are held every four years, but the Prime Minister can dissolve the Folketing (Parliament) at any time and call for new elections.

3. The Gambia

- Government is divided into independent executive, legislative, and judicial branches.
- Executive power is vested in a President who is popularly elected to a five-year term.
- The Vice-President, elected concurrently with the President, must belong to the same political party.
- The legislature is composed of 43 members, four of whom are elected by the tribal chiefs.
- The Attorney-General, appointed by the President, is an ex officio member.

4. Ghana

- 1979 constitution is essentially an amalgamation of the American and British systems.
- It provides for three primary branches of government: a strong Executive, a unicameral parliament and an independent Judiciary headed by a Supreme Court.
- Additionally, a Council of State consists of respected elders and representatives of the major professions, whose duty is to advise the President on important matters, and an ombudsman, whose responsibility will be to investigate the other branches of government.

5. Sudan

- A permanent Constitution was promulgated on May 8, 1973, under which a new People's Assembly was elected.
- Half of its 250 members were elected on the basis of geographical representation, 100 were selected by various worker groups and mass organizations, and 25 were appointed by the President.
- In February 1980, the assembly was increased to 368 members, with the new seats being allocated principally to organized labor, farmers, and other occupational interest groups.